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SUPREME COURT OF THE UNITED STATES.

No. ~~210~~. 1887. U.S. 4.3.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

CHARLES LE BARON.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

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THE UNITED STATES OF AMERICA.

Circuit Court of the United States for the fifth judicial circuit and southern district of Alabama.

Pleas had before the honorable the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, at a term thereof begun and held in and for said district, at Mobile, on the fourth Monday of December, in the year of our Lord one thousand eight hundred and fifty-seven, before the honorable John Gayle, judge of said court, presiding.

THE UNITED STATES OF AMERICA
vs.
CHARLES LE BARON. } 3,259.

Be it remembered, that heretofore, to wit, on the fourteenth day of March, in the year of our Lord one thousand eight hundred and fifty-three, the plaintiffs sued out of said court a writ of capias ad respondendum against defendant, in the words and figures following, to wit:

Writ of Capias Ad Res.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the fifth judicial circuit and southern district of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to take the body of Charles Le Baron, who is a citizen of the State of Alabama, and him safely keep, so that you have him before the hon. the circuit court aforesaid, at the place of holding said court at Mobile, on the second Monday of April next, to answer unto the United States of America in a plea, that he render to the United States of America the sum of twenty thousand dollars, which he owes to and unjustly detains from the United States of America, to the damage of the United States of America of thirty thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this fourth Monday of December, in the year of our Lord one thousand eight hundred and fifty-two. [L. S.]

Issued the fourteenth day of March, in the year of our Lord one thousand eight hundred and fifty-three.

Attest: JOHN FITTS,
Clerk C. C. Southern Dist. of Ala.

Cause of Action.

This action is founded on a joint and several bond for the sum of twenty thousand dollars, made by Oliver S. Beers, Charles Le Baron, the defendant, and George N. Stewart, dated 1st July, 1850, and payable to the United States of America, with a condition annexed to the effect that the said Oliver S. Beers, as deputy postmaster at Mobile, should well and truly execute the duties of said office according to law and the instructions of the Postmaster General, and account for and pay over all moneys which should come to his hands as such; which condition has been broken by the failure of the said Beers well and truly to execute the duties of said office, and to account for and pay over such moneys.

HOPKINS, JONES & LOMAX,
Plff's Att'ys.

Marshal's Return.

Received 14th March, 1853, and on same day executed this writ on defendant and gave him a copy.

CHAS. BINGHAM,
U. S. Marshal.
By H. WARFIELD,
Deputy.

And the 13th day of April, 1853, the same being a day of the April term of said court, begun and held on the second Monday of April, A. D. 1853, the plaintiffs filed in said court a declaration, in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA.

Circuit Court U. S., fifth judicial circuit and southern district of Alabama.—April Term, A. D. 1853.

Charles Le Baron, a citizen of the State of Alabama, was attached to answer to the United States of America in a plea of debt, &c., &c.; whereupon the said United States of America, by P. Phillips, their attorney, complain of said Charles Le Baron, that Oliver S. Beers having been duly appointed deputy postmaster of the city of Mobile, in the county of Mobile and State aforesaid, the said defendant, as surety for the said Oliver S. Beers, heretofore, to wit, on the first day of July, A. D. 1850, at Mobile aforesaid, and within the jurisdiction of this court, by his certain writing obligatory, sealed with his seal, and now here shown to the court, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the United States of America in the sum of twenty thousand dollars above demanded.

Which said writing obligatory was and is subject to a certain condition thereunder written, whereby said Oliver S. Beers, as dep-

uty postmaster aforesaid, undertook and agreed well and truly to execute the duties of said office; and among other things the said Oliver S. Beers agreed to pay the balance of all moneys that should come to his hands for the postage of whatever is by law chargeable with postage, in the manner prescribed by the Postmaster General of the United States for the time being; and also to do and perform, as agent for the Post Office Department, all such acts and things as may be required of him by the Postmaster General; and moreover, faithfully to account with the United States, in the manner directed by said Postmaster General, for all moneys, bills, bonds, notes, receipts, and other vouchers which he, as agent as aforesaid, shall receive for the use and benefit of said Post Office Department.

And the plaintiff avers that the said Oliver S. Beers, as postmaster aforesaid, has come into the receipt of large sums of money for postages and post office dues; and there is due and owing to the pl'ff a large balance on this account; and that the said Oliver S. Beers has failed to comply with the conditions of the said writing obligatory aforesaid, by refusing, on the demand of the said Postmaster General, to pay over the said balance and to account for the same.

By reason of which breach the said writing obligatory has become forfeited, whereby an action hath accrued to said plaintiff to demand and have of and from Charles Le Baron, surety as aforesaid and defendant herein, the sum of twenty thousand dollars.

Yet the said defendant hath not paid the said sum, although often requested so to do; but to pay the same has hitherto wholly refused, to the damage of said plaintiff thirty thousand dollars.

PHILLIPS,
Att'y for Pl'ff.

And on the 13th day of April, 1853, the same being a day of the April term of said court, begun and held on the second Monday in April, A. D. 1853, the following order was made in this cause:

Continuance.

THE UNITED STATES
vs.
CHARLES LE BARON.

It is ordered by the court that this cause be continued.

Demurrer.

THE UNITED STATES
vs.
CHARLES LE BARON.

Southern district of Alabama, Circuit Court of the United States.—April Term, 1853.

And the said defendant, by his attorneys, comes and defends the

wrong and injury, when, &c., and saith that the said declaration and the matters and things therein set forth are not sufficient in law to entitle the said plaintiffs to have and maintain their aforesaid action against him, the said defendant, in this behalf, and that he, the said defendant, is not bound by the law of the land to answer thereto; wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment of said declaration, &c.

STEWART & EASTON,
Atty's for Deft.

Filed 18th April, 1853.

JOHN FITTS, *Clerk.*

And on the 9th day of January, 1854, the same being a day of the December term of said court, begun and held on the fourth Monday of December, A. D. 1853, the following order was made and entered in this cause, to wit:

Order allowing Amendment.

THE UNITED STATES
vs.
CHARLES LE BARON.

This day came the parties, their attorneys, and thereupon came on to be heard the demurrer of the defendant to the plaintiff's declaration filed herein, and after the argument of counsel, as well in support of as against the same, it is considered by the court that the demurrer be sustained; and thereupon, on motion of the plaintiffs, by their counsel, for this purpose, they are permitted to amend their declaration in this behalf, and the said cause is continued until the next term of this court.

And afterwards, to wit, on the 18th day of April, 1854, the same being a day of the April term of said court, begun and held on the second Monday of April, 1854, the plaintiffs filed an amended declaration, in these words and figures following:

Amended Declaration.

UNITED STATES OF AMERICA.

Circuit Court U. S., fifth judicial circuit and southern district of Alabama.

Charles Le Baron, a citizen of the State of Alabama, was attached to answer to the United States of America in a plea of debt, &c.; whereupon the said United States of America, plaintiffs, by Manning & Walker, attorneys, complain of the said Charles Le Baron of a plea, that he render unto them the sum of twenty thousand dollars which to them, the said plaintiffs, he owes, &c.

For that whereas heretofore, to wit, on the first day of July, in the year of our Lord eighteen hundred and fifty, at Mobile, to wit, in the State aforesaid, and within the jurisdiction of this court,

the said Charles Le Baron by his certain writing obligatory, sealed with his seal, and now here shown to the court, jointly and severally with other persons not proceeded against in this suit, acknowledged himself to be held and firmly bound unto the United States in the sum of twenty thousand dollars to be to them paid; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting that one Oliver S. Beers was deputy postmaster at Mobile, in the said State of Alabama, it was provided that in case the said Oliver should well and truly execute the duties of said office of deputy postmaster according to law and the instructions of the Postmaster General, and should faithfully once in three months, and oftener if required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and should pay the balance of all moneys that should come to his hands for the postage of whatever was by law chargeable with postage in the manner prescribed by the Postmaster General of the United States for the time being; and should safely keep, without loaning, using, depositing in bank, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody till the same should be ordered by the Postmaster General to be transferred or paid out, and when such orders for transfer or payment should be received should faithfully and promptly make the same as directed; and should also faithfully do and perform as agent and depositary of the Post Office Department all such acts and things as might be required of him by the Postmaster General; and should, moreover, faithfully account with the United States in the manner directed by the said Postmaster General for all moneys, bills, bonds, notes, drafts, receipts, and other vouchers, which he, as agent and depositary as aforesaid, should receive for the use and benefit of the said Post Office Department, then and in that case the said writing obligatory should become void.

And the said plaintiffs aver that the said Oliver did not well and truly execute the duties of his said office according to law and the instructions of the Postmaster General.

1. And the plaintiffs assign for breach of said condition, that while said Oliver S. Beers was deputy postmaster as aforesaid, under said writing obligatory, and after the making and delivery thereof, to wit, on the 10th day of July aforesaid, and divers other days before the commencement of this suit at, to wit, his office, in the district aforesaid, he, the said Oliver, as such deputy postmaster, and according to law, received divers large sums of money for postage, and other moneys properly payable and paid to him as such deputy postmaster, for and on account of the said plaintiffs—that is to

say, sums amounting together to fifty-one thousand and seventy-five dollars and twenty-five cents, and there is now due and owing from him, on account of said moneys, to the plaintiffs a large balance, to wit, a balance of twenty thousand five hundred and forty-three dollars and fifty-two cents; which balance the said Oliver hath wholly failed and refused, and still neglects and refuses to pay, although the same was duly demanded of him under the instructions of the Postmaster General aforesaid, and on behalf of plaintiffs, to wit, on the day of February, in the year 1853, at Mobile, to wit, in the district aforesaid.

2. And for a further assignment of a breach of the said condition, the plaintiffs further say, that the said Oliver S. Beers, while he was deputy postmaster as aforesaid, under the said writing obligatory, and after the making and delivery thereof, did not safely keep without loaning or using the public money collected by him, or that otherwise and according to law came to his possession or custody during that time, but that, on the contrary, he took and converted to his own use, to wit, on the 10th day of July, in the year 1850, and on divers other days before the commencement of this suit, to wit, at his office, in the district aforesaid, a large other sum of such public money belonging to plaintiffs, to wit, the further sum of twenty thousand six hundred and seventy-three dollars and sixty-one cents, which had theretofore been collected by him as such deputy postmaster, or otherwise according to law been placed in his possession and custody as such deputy posmaster at, to wit, his office, in the district aforesaid, whereby the last mentioned sum of money has been lost to the plaintiffs.

3. And for a further assignment of a breach of said condition, the said plaintiffs say that the said Oliver, while he was deputy postmaster as aforesaid, and as such was the agent and depositary for the Post Office Department, as in said condition mentioned, after the making and delivery of said writing obligatory, and under the same, to wit, on the 10th day of July, in the year 1850, and on divers other days before the commencement of this suit, to wit, at his office, in the district aforesaid, received for the use and benefit of the said Post Office Department, according to law, divers other large sums of money, to wit, the sum of twenty thousand dollars, and has failed to account therefor with the United States aforesaid, in the manner directed by the Postmaster General.

4. And for a further assignment of a breach of said condition, the plaintiffs say, that while the said Oliver was deputy postmaster as aforesaid under the said writing obligatory, and after the making and delivery thereof, to wit, on the first day of July, in the year 1850, and on divers other days before the commencement of this suit, to wit, at his office in said district, he, the said Oliver, as such deputy postmaster, and according to law, received divers other large sums of money for postage and other moneys properly payable and paid to him as such deputy postmaster for and on

account of the said plaintiffs—that is to say, sums amounting together to fifty-one thousand and seventy-five dollars and twenty-five cents, and that he, the said Oliver, so negligently, carelessly and faithlessly acted then and there in his said office, and so neglected to take care of said moneys, and to superintend with due diligence the assistants and clerks employed by him to aid him as such deputy postmaster, that the said assistants and clerks, or some of them, by reason thereof, then and there embezzled or took and converted to their own use, or otherwise wasted, a large amount of the said last mentioned sums of money, to wit, the sum of twenty thousand dollars thereof, whereby the same was wholly lost to the plaintiffs.

5. And the plaintiffs assign for a further breach of the aforesaid condition of said writing obligatory, that the said Oliver S. Beers, while acting as deputy postmaster as aforesaid under said writing obligatory, and after the same was made, did not promptly and faithfully pay out the public moneys which lawfully came to his hands as such deputy, upon the order of transfer and payment thereof, which he received of the Postmaster General; but, on the contrary, failed so to do in this, to wit: that the said Oliver S. Beers, having received a large amount of the public moneys lawfully paid to him and placed in his hands as such deputy postmaster, to wit, the sum of twenty-five thousand dollars, which had not been lawfully transferred or paid out by him, heretofore, to wit, on the 29th day of January, in the year 1853, at his office, in Mobile, to wit, in the district aforesaid, failed and refused to pay to the lawful holder and payee thereof the amount of a draft or order upon him as such deputy postmaster, made by the Postmaster General, according to law, on the eighteenth day of January, in said year 1853, requiring him, the said Oliver, deputy as aforesaid, to pay to Thomas H. Watts, executor of Wade Allen, or order, eight thousand dollars, and which said draft or order was, to wit, on the 29th day of January, aforesaid, duly presented to him, the said Oliver, for payment, and payment thereof demanded, to wit, at his office in the district aforesaid, and payment thereof then and there refused by him.

By reason of which said several breaches the said writing obligatory has become forfeited, whereby an action hath accrued to the plaintiffs to demand and have of the said Charles Le Baron, the defendant, the aforesaid sum of twenty thousand dollars in the said writing obligatory mentioned.

Yet the said defendant hath not paid the said sum of money, nor any part thereof, although often requested so to do, but hath wholly failed and refused, and still neglects and refuses, to the damage of the paintiffs of thirty thousand dollars, and therefore they bring suit, &c.

MANNING & WALKER,
Att'ys for Plaintiffs.

And on the 18th day of April aforesaid, upon the filing of the said amended declaration, an order was made and entered, in the words following:

Order of Continuance.

THE UNITED STATES
vs.
CHARLES LE BARON.

Upon the application of the defendant, this cause is continued by the court until the next term.

Order allowing to 1st June to Plead or Demur.

And upon the further application of the defendant, he is allowed until the first of June next to plead or demur to the amended declaration herein filed.

And on the 29th day of April, 1854, the defendant filed in the clerk's office of said court a demurrer, in the words and figures following, to wit:

Plea—Oyer of Bond, &c.

THE UNITED STATES
vs.
CHARLES LE BARON.

Cause pending in the circuit court of the United States for the 5th judicial circuit and southern district of Alabama.

And the said defendant, Charles Le Baron, by attorney, craves oyer of *of* the writing obligatory, which is read to him in these words:

Know all men by these presents, that we, Oliver S. Beers, of Mobile, in the county of Mobile, State of Alabama, and Charles Le Baron and George N. Stewart, are held and firmly bound unto the United States of America, in the just and full sum of ($20,000) twenty thousand dollars; for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of July, in the year of our Lord one thousand eight hundred and fifty, (1850.)

And he further craves oyer of the condition thereto annexed, which is also read to him:

The condition of this obligation is such, that whereas the above bounden Oliver S. Beers is deputy postmaster at Mobile aforesaid: Now if the said Oliver S. Beers shall well and truly execute the duties of the said office, according to law and the instructions of the Postmaster General, and faithfully, once in three months, and

oftener if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage, in the manner prescribed by the Postmaster General of the United States for the time being; and shall keep safely, without loaning, using, depositing in bank, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed; and shall also faithfully do and perform as agent and depositary for the Post Office Department all such acts and things as may be required of him by the Postmaster General; and moreover shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, bills, bonds, notes, drafts, receipts, and other vouchers, which he, as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department—then the above obligation shall be void.

OLIVER S. BEERS, [ ]
CH. LE BARON, [ ]
GEORGE N. STEWART. [SEAL.]

Witness: FRANCIS DAVID,
ROBERT M. SANDS.

Demurrer.

And thereupon he says actio non, because, he says, the matters and things set forth in the declaration and in the assignment of the breaches of the condition of said bond are insufficient in law to enable the plaintiffs to maintain their said suit against him, and for causes of demurrer he assigns—

1st. That the bond and condition are insufficient in law to give the plaintiffs a right of action.

2d. That the assignment of breaches of the condition of said bond as set forth in the declaration are insufficient to enable the plaintiffs to maintain said suit, and therefore he demurs to each assignment of the breach of the condition of said bond separately.

HAMILTON,
For Def't.

And on the 5th day of January, 1855, the same being a day of the December term of said court, begun and held on the fourth Monday of December, A. D. 1854, the following order was entered in this cause:

Order allowing Amendment.

THE UNITED STATES
vs.
CHARLES LE BARON.

This day came the United States, by their counsel, and came, also, the defendant, and the demurrer of the defendant to the plaintiffs' declaration coming on to be heard before the same was decided, the said United States move the court for leave to amend their declaration as to time and venue in some of the breaches assigned, which leave is given by the court, and the declaration amended accordingly. And on the 11th day of January, 1855, being also a day of the term of said court last aforesaid, the defendant filed a demurrer to plaintiffs' said amended declaration, which is as follows, to wit:

Plea and Prayer for Oyer of Bond, &c.

THE UNITED STATES OF AMERICA
vs.
CHARLES LE BARON.

Circuit Court of the United States for the 5th judicial circuit and southern district of Alabama.

And now the said defendant comes and defends the wrong, &c., and prays oyer of the said bond and the condition thereof, which are read to him as follows, to wit:

Know all men by these presents that we, Oliver S. Beers, of Mobile, in the county of Mobile, and Charles Le Baron, and George N. Stewart, are held and firmly bound unto the United States of America in the just and full sum of ($20,000) twenty thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of July, in the year of our Lord one thousand eight hundred and fifty, (1850.)

The condition of this obligation is such, that whereas the above bounden Oliver S. Beers is deputy postmaster at Mobile aforesaid: Now if the said Oliver S. Beers shall well and truly execute the duties of the said office according to law and the instructions of the Postmaster General, and faithfully, once in three months, and oftener if thereto required, render accounts of his receipts and expenditures, as deputy postmaster, to the Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage in the manner prescribed by the Postmaster General of the United

States for the time being; and shall keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out, and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed; and shall also faithfully do and perform, as agent and depositary for the Post Office Department, all such acts and things as may be required of him by the Postmaster General, and moreover shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, bills, bonds, notes, drafts, receipts, and other vouchers, which he as agent and depositary as aforesaid shall receive for the use and benefit of the said Post Office Department; then the above obligation shall be void.

(Signed) OLIVER S. BEERS, [ ]
CH. LE BARON, [ ]
GEO. N. STEWART. [ ]

Witness: FRANCIS DAVID,
ROBERT M. SANDS.

Demurrer.

And therefore the said defendant says, that the matters and things as set forth and stated in said declaration are insufficient in law to enable the plaintiffs to sustain said suit, or to have and demand the sum of money mentioned in said writing obligatory, and therefore he demurs to said declaration, and for causes of demurrer he says, that said writing obligatory is uncertain and insufficient in law to enable the plaintiffs to maintain said suit, and that the same is void in law.

2. That the assignment of the breaches of the condition of said writing obligatory is too uncertain and insufficient to enable the plaintiffs to have or maintain said suit in this: that it does not appear from said assignment of breaches that the defaults complained of occurred or took place during the term for which this defendant was bound as the security of said Oliver S. Beers, as deputy postmaster at Mobile, nor within two years prior to the commencement of this suit.

3. It does not appear from the declaration that the defaults specified were made or took place during the term of office for which said defendant was bound as the security of said Beers, and for these insufficiencies the defendant demurs to said declaration, and to the assignment of the breaches of the condition of said writing obligatory, separately, to all and each thereof, and prays judgment whether said plaintiffs *out* to have or maintain said suit.

HAMILTON,
For Def't.

And on the 13th day of January, 1855, a day also of the term last aforesaid of said court, and after the overruling of the demurrer in this case, the defendant filed pleas in the words and figures following, to wit:

Circuit Court of the United States.—December Term, 1854.

UNITED STATES
vs.
CHARLES LE BARON.

And the said Charles Le Baron, defendant, comes by his attorneys and defends, &c., and for plea in this behalf saith, actio non, &c., because he says the said Oliver S. Beers did not in any manner break the condition of said bond as in said declaration the said plaintiffs have alleged, and for answer to the said breach in the said declaration first assigned, he saith:

1. That the said Beers did not while he was postmaster under said writing obligatory, and after the making and delivery thereof at the times in said breach mentioned, as such deputy postmaster, according to law, receive any moneys for postages, or other moneys properly payable and paid to him as such deputy postmaster for account of said plaintiffs, to any amount whatever: nor is there now due and owing from him on account of said moneys to said plaintiffs any moneys which he, said Beers, has refused to pay, nor was there such demand or refusal to pay under instructions as the said plaintiffs aver; but that in truth and in fact all the said averments of fact in said first breach assigned and set forth are wholly untrue, and this he prays may be inquired of by the country, &c.

2. And for answer to the second breach in the said plaintiff's declaration, secondly assigned and set forth, the said defendant in fact saith, that the said Beers while he was deputy postmaster under said writing, and after the making and delivery thereof, did not fail or omit safely to keep, without using or loaning, any public money collected by him, or that otherwise and according to law came to his possession or custody; nor did he take and convert to his own use on the days in said breach alleged any sums of money before collected by him as deputy postmaster or otherwise according to law, or placed in his control as deputy postmaster in his office, whereby any such sum of money was lost to the said plaintiffs as in said second breach is alleged; but that the averments in said second breach alleged are wholly untrue, and this he prays may be inquired of by the country, &c.

3. And as to the said third breach in the said declaration alleged, said defendant saith that said Beers did not receive for the use of the said Post Office Department, according to law, while he was postmaster, and as such, was agent and depositary for the Post Office Department, as in said condition mentioned, after the mak-

ing and delivery of said writing, and under the same, at the days or times specified, any such sums of money as is in said third breach mentioned, which he has failed to account for with the plaintiffs in the manner directed by the Postmaster General, as in said third breach is alleged, but that, in truth and fact, the said allegations in the said third breach averred are wholly untrue in manner and form as therein set forth, and this he prays may be inquired of by the country, &c.

4. And as to the fourth assignment of breaches in the said plaintiffs' declaration set forth, the said defendant saith that the said Beers did not, while he was deputy postmaster under said writing, and after the making and delivery thereof at the times and place in said fourth breach described, receive any such sums of money for postage or other moneys payable and paid to him as such deputy postmaster for and on account of said plaintiffs, nor did he so negligently or carelessly or faithlessly act in his said office, or neglect to take care of said moneys, or superintend with due diligence the assistants or clerks employed by him to aid him as such deputy postmaster, so that the said assistants or clerks embezzled, or took, or converted to their own use or waste any moneys, nor were any such moneys thereby lost to the said plaintiffs, as in the said fourth breach is averred and alleged, but in truth all said allegations in said fourth breach so alleged are wholly untrue; and this he prays may be inquired of by the country, &c.

5. And as to the said fifth breach in the said declaration specified the defendant saith that said Beers did not fail or refuse, promptly and faithfully, to pay out any public moneys lawfully come into his hands as such deputy upon any order of transfer and payment received of the Postmaster General; nor did he, having received any sum of public money lawfully paid to him or placed in his hands as deputy postmaster, which had not been lawfully transferred or paid out by him, nor did he, on the 29th January, 1853, fail or refuse to pay to any lawful holder and payee the amount of any draft or order drawn on him as such deputy postmaster, made by the Postmaster General according to law, at the time specified in said fifth breach, requiring him to pay said Watts, ex'r, or order, eight thousand dollars, nor *nor* was any such draft refused payment, as the said plaintiff hath in his said fifth breach averred and alleged, but, in truth and in fact, the said allegations and averments in said fifth breach set forth are wholly untrue; and this he, said defendant, prays may be inquired of by the country, &c.

Wherefore the said defendant saith that no breach of the condition of said bond hath been committed, as he had above pleaded, and all he has prayed may be inquired of by the country as aforesaid.

2d Plea.

And for a further plea in this behalf the said defendant saith actio non, &c., because, he saith, that no breach of the condition of said bond hath occurred or been committed, as set forth in the said declaration specified, within two years next before the commencement of this suit; wherefore he saith that said defendant is not in any manner responsible for any such breach; and this he is ready to verify, &c.; wherefore he prays judgment in this behalf, &c.

3d Plea.

And the said Charles Le Baron, defendant, by his attorneys, comes and defends, &c.; and for a third plea in this behalf saith, actio non, &c., because, he saith that true it is that he, the said Oliver S. Beers, was, at the time of the date of said bond in the said declaration described, to wit, on the first day of July, in the year 1850, deputy postmaster at Mobile, and was in the exercise and discharge of the duties of said office.

And further he saith, that on the day and year aforesaid, he was in the discharge of the duties of said office, by virtue of an appointment made by the President of the United States during the recess of the Congress and of the Senate of the United States, to wit, on the fourth day of April, 1849; which appointment so made was, by virtue thereof and by law, to endure until the end of the next succeeding session of the Senate of the United States, and no longer.

And further he saith, that the next succeeding session of the Senate of the United States after the making of said appointment ended and determined on the thirtieth day of September, eighteen hundred and fifty.

And the said defendant further saith, that the said Oliver S. Beers, deputy postmaster as aforesaid, did not in any manner, on the said first day of July, 1850, nor on the said thirtieth day of September, 1850, nor on day or time between said days, omit to perform any *any* of the duties required by the conditions of said bond, nor commit any of the breaches in the said declaration set forth; but that, on the contrary thereof, he did in all things, on the days aforesaid, and at all times between said two days, well and truly perform the conditions of said bond in all things, and did well and truly account for and pay over all moneys which came to his hands, as such deputy postmaster, for account of the plaintiffs, to said plaintiffs, as required by his duty, and did, during said time, safely keep all such moneys, without using or loaning the same, as by his duty he was required to do; and did faithfully and diligently, during all said time, take care of the moneys of said office, and diligently superintend all the assistants and clerks of said office, and promptly pay all the moneys of said office, so

that no loss whatever was sustained by the said plaintiffs in this behalf; but did in all things do and perform the duties of said office during the time above specified. Wherefore he saith that the condition of said bond was not in any manner broken; and this he, the said defendant, is ready to verify, &c. Wherefore he prays judgment, &c.

HAMILTON,
For Defendant.

And on the 13th day of January, A. D. 1855, a day also of the term last aforesaid of said court, the plaintiffs, by their attorneys, filed in the clerk's office of said court their demurrer to defendant's pleas, in the words and figures following, to wit:

Demurrer to Pleas.

THE UNITED STATES
vs.
CHARLES LE BARON.

Plaintiffs demur to so much of defendant's first plea as relates to the second breach assigned in the declaration specially; and for cause of demurrer show, that in the issue thereby tendered by defendant upon said breach, the day or days upon which or time when the said Oliver S. Beers, as deputy postmaster as aforesaid, and while he was such, received the moneys of plaintiffs, as alleged in the declaration, is made a material part of the issue tendered, when, in truth and in law, such time is not material; wherefore plaintiffs pray judgment of said part of said first plea.

2. And to so much of said plea as relates to the third breach assigned plaintiffs in like manner demur, and for the same cause, that time is thereby made a material part of the issue tendered, when in truth and in law such time is immaterial; wherefore plaintiffs pray judgment of said last mentioned part of said first plea.

3. And to so much of the same plea as relates to the fourth breach assigned by the plaintiffs, the said plaintiffs in like manner demur, and for cause of demurrer show, that time is thereby, and also place, made material parts of the issue thereby tendered, when, in truth and in law, they are immaterial; wherefore plaintiffs pray judgment of said last mentioned part of said first plea, and whether they shall be required further to answer said first plea.

4. And to the plea of defendant secondly above pleaded, plaintiffs demur, because, as they say, said plea is no answer to the declaration.

And to the plea thirdly by defendant pleaded, plaintiffs demur, and for cause of demurrer show, that it is not alleged in said plea that the bond sued on in this cause was given for the faithful performance by said Oliver S. Beers of his duties as deputy postmaster, under and during the continuance of his executive or presidential

appointment in said plea referrrd to, or that said appointment, or the said Oliver's term of office thereunder, continued after the day of the date thereof; wherefore plaintiffs pray judgment of said plea, &c.

MANNING & WALKER,
Att'ys for Pl'ffs.

The defendant joins in demurrer and prays the judgment of the court thereon.

HAMILTON, *for Def't.*

And on the 13th day of January, 1855, a day also of the term last aforesaid of said court, the plaintiffs by their attorneys filed replications to defendant's pleas, in the words and figures following, to wit:

THE UNITED STATES
vs.
CHARLES LE BARON.

And to the plea of the defendant secondly above pleaded, the said plaintiffs reply and say, that the defaults of the said Oliver S. Beers, as deputy postmaster as aforesaid, whereof the plaintiffs complain in their assignment of breaches of the said bond, did occur or were committed within two years next before the commencement of this suit; and of this they put themselves upon the country.

And the defendant does the like.

DARGAN, SMITH & HAMILTON,
Defendant's Attorneys.

And for a replication to the plea of the defendant thirdly above pleaded, the said plaintiffs say, that on and after the delivery by the defendant of the bond aforesaid, to wit, on the first day of July, in the year 1850, the said Oliver S. Beers was not deputy postmaster of the United States as aforesaid, under and by virtue of an executive appointment of him to such office as alleged, and for the term alleged in said third plea, but was, to wit, then deputy postmaster of the United States at Mobile aforesaid, to wit, in the district aforesaid, under and by virtue of an appointment of him, the said Oliver, as such deputy postmaster, theretofore made, to wit, on the 22d day of April, in the year 1850, by the President of the United States, by and with the consent of the Senate of the United States, for a long term of office, to wit, a term of four years from the day and year last aforesaid, unless he should be therefrom sooner removed by the President of the United States; that the bond aforesaid was made on the day of the date thereof, at, to wit, in the district aforesaid, for the faithful discharge by said Oliver of the duties of said office, under said last mentioned appointment; and that the breaches of

the condition of said bond whereof plaintiffs have complained in their declaration in this cause, occurred and were committed after the making and delivery as aforesaid of said bond, and before the commencement of this suit, to wit, in the district aforesaid; and this they are ready to verify.

MANNING & WALKER, *for Pl'ffs.*

Rejoinder.

And on the said 13th day of January, A. D. 1855, a day also of the term last aforesaid of said court, the defendant filed in the clerk's office of said court a rejoinder to the plaintiffs' replication to defendant's third plea, in the words and figures following, to wit:

UNITED STATES
vs.
CHARLES LE BARON.

And the said defendant, for rejoinder to the plaintiffs' replication to defendant's third plea, says, that at the time of the execution of said bond, said Oliver S. Beers was not postmaster in the manner and for the term of office set forth in the replication, but was postmaster by presidential appointment, as set forth in said third plea; and so he says, said bond applied to and covered only the time set forth in the third plea, and did not apply to and cover any other or new tenure of office; and of this he puts himself upon the country.

DARGAN & HAMILTON & SMITH,
For Def't.

And the plaintiffs do the like.

MANNING & WALKER,
For Plaintiffs.

Judgment.

And on the aforesaid 13th day of January, A. D. 1855, being a day of the said December term, 1854, of said court, the following proceedings were had:

THE UNITED STATES
vs.
CHARLES LE BARON.

This day came the United States, by their attorneys, and came also the said defendant, by his attorneys; whereupon the said defendant demurs to the said amended declaration as in his demurrer set forth, and the matters of law being argued and understood by the court, it is considered by the court the said demurrer be overruled, and that said defendant do plead to the plaintiff's declaration; whereupon the said defendant files his three pleas to the said amended declaration, to each of which pleas the said plaintiffs,

by their attorneys, demur, as in their demurrers on file set forth; and the matters of law therein being argued and understood by the court, it is considered that the demurrer to the first of the three pleas pleaded by defendant be sustained, but the demurrer to the second and third pleas by him pleaded be overruled; and the defendant has leave to amend his said first plea so as to avoid the defect mentioned in the demurrer thereto, which he declines to do; and the said plaintiffs reply to the said second and third pleas, and issue is therein taken as to the second plea; and said defendant rejoins to plaintiffs' replication to the third plea by him pleaded, and issue thereon. Pending the argument in this cause, the court adjourned until Monday morning, the 15th January, 1855, at 10 o'clock a. m. of said day.

Monday morning, January 15th, 1855.

The court met pursuant to adjournment: present Hon. John Gayle, presiding.

This day the argument in this cause was continued, and before it was concluded the court adjourned until to-morrow morning, at 10 o'clock.

Tuesday morning, January 16th, 1855.

This day the court met pursuant to adjournment: present the Hon. John Gayle, presiding.

And this day came the said parties, by their attorneys, and also came a jury of good and lawful men, to wit: Peleg Brown and eleven others, who being elected, tried, sworn, and charged the truth to speak in the issues joined, on their oaths do say, We, the jury, find the issues for the defendant; it is therefore considered by the court that the defendant go hence without day.

Whereupon the plaintiffs prayed a writ of error from the said judgment to the Supreme Court of the United States, and the said cause was taken to the said Supreme Court on a bill of exceptions filed by the said plaintiffs, and allowed by the court.

And afterwards, to wit, at a term of said court begun and held in and for said district at Mobile, on the second Monday of April, A. D. 1857, came the said plaintiffs, by their attorney, and produced the opinion and mandate of the Supreme Court of the United States, reversing the judgment in the said cause; which are filed, and the said cause redocketed for further proceedings.

And afterwards, to wit, on the 21st day of April, A. D. 1857, being a day of the said last-mentioned term of said court, the following proceedings were had in said cause, to wit:

Judgment for Pl'ff.

THE UNITED STATES
vs.
CHARLES LE BARON. } 3,259.

This day came as well the United States of America by their attorney, A. J. Requier, esq., as the said defendant by his attorneys, and a jury being called to try the issue joined between the parties aforesaid, came, to wit, Edward S. Trigg, John Y. Thompson, W. B. Harwood. R. L. Ewill, C. Wainright, G. G. Prentice, James Bruce, R. J. Lawrence, J. B. Hupin, George Mason, J. M. Muldon, jr., and Thomas Ellison, twelve good and lawful men, who being duly elected, tried, and sworn, on their oaths do say, We, the jury, find for the plaintiffs, and assess the damages at eight thousand six hundred and eighty-six $\frac{50}{100}$ dollars. It is therefore considered by the court that the said United States of America, the plaintiffs, do recover of the said Charles Le Baron (defendant) the sum of twenty thousand dollars for their debt in the declaration mentioned, to be discharged by the payment of the said sum of eight thousand six hundred and eighty-six dollars and fifty cents for their damages, so by the jurors aforesaid in form aforesaid assessed, and costs of suit in this behalf expended.

Whereupon the following motion was placed upon the motion docket of said court, at the said term, by the defendant in said cause, to wit:

Motion to allow time to file Petition, &c., for new trial.

UNITED STATES
vs.
CHARLES LE BARON. } April Term, 1857.—Trial Docket No. 10.

The defendant moves the court that the proceedings in this cause be stayed for forty-two days, as provided by statute, in order to allow time for filing a petition with reasons and a showing for a new trial of the issues joined in this cause, the verdict rendered being erroneous.

DARGAN, *for Def't.*
REQUIER, *contra.*

Order to stay Execution and give time to file Petition, &c.

And on the 7th day of May, A. D. 1857, being another day of the said term last mentioned, the following order was made, to wit:

Order by Hon. John Gayle on application of the Defendant.

THE UNITED STATES
vs.
CHARLES LE BARON. }

It is ordered by the court, that execution of the judgment in this

cause be stayed forty-two days, to give defendant time to file in the clerk's office a petition for a new trial.

(Petition, &c., filed in vacation.)

Petition for new trial, and Order to stay Exctn. to next term.

In the Circuit Court of the United States, at Mobile.—April Term, 1857.

THE UNITED STATES vs. CHARLES LE BARON. } Debt on Bond.

To the Honorable John Gayle, judge, presiding in said court, the petition of Charles Le Baron, defendant in said cause, respectfully shows: That at the April term of said court the above entitled cause came on to be tried before your honor on the issues of fact joined in the cause, and that by the decision of the jury by them returned on said trial, a verdict was found for the United States, and against your petitioner, for the sum of $——.

Your petitioner further shows, that the said verdict was wholly unauthorized by the evidence produced before the said jury and the law of the case, and the said jury grossly and palpably erred in finding said verdict, which by their oaths they were in no manner warranted to find and return, and the said verdict was directly in contravention of the law of the case, which was fully explained and given them in charge by the court; and that on said trial the defendant was palpably and clearly, and beyond any doubt, entitled to a verdict for the defendant; all which facts are within the knowledge of your honor, as having presided at said trial; wherefore no further proof thereof is now needed to make the same manifest.

In consideration of all which, your petitioner prays that this, his petition, may be allowed to be filed as provided by statute, to the end that the execution of said judgment may be stayed till the next term of said court, when said verdict may be set aside and a venire de novo awarded to try the said issue, so that a correct verdict may be rendered thereon. And, as in duty bound, &c.

E. S. DARGAN & HAMILTON,
for Def't.

The foregoing petition is allowed to be filed on the ground that the finding of the jury, in the opinion of the court, was contrary to the evidence and the charge of the court. It is therefore ordered that execution be stayed until the next term.

16th June, 1857.

JOHN GAYLE,
Presiding Judge Cir. Court.

Filing.

Filed 16th June, 1857.

GEO. E. HOLT, *Clerk.*

And afterwards, to wit, at a term of said court begun and held in and for said district, on the fourth Monday of December, A. D. 1857, the following proceedings were had, to wit:

This day came as well the said United States of America, by A. J. Requier, esq., their attorney, as the said defendant by his attorneys, and the said defendant moved the court as follows, to wit:

Motion to set aside Verdict, &c.

THE UNITED STATES vs. CHARLES LE BARON. } Verdict for Pl'ff at April , 1857.

The proceedings in this cause having been stayed on motion of the defendant, a motion is now made to set aside the verdict, and for a new trial.

DARGAN, *for motion.*
REQUIER, *contra.*

Order to set aside Verdict.

THE UNITED STATES OF AMERICA vs. CHARLES LE BARON.

This day came as well the United States of America, by A. J. Requier, esq., their attorney, as the said defendant by his attorneys, and the defendant's motion herein to set aside the verdict and judgment therein rendered at the last term being heard, it is now ordered by the court that the said motion be sustained; that the said verdict and judgment thereon be set aside, and a venire de novo awarded.

And afterwards, to wit, on the 7th day of January, A. D. 1858, being another day of the said term last mentioned, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA vs. CHARLES LE BARON. } 3,259.

This day came as well the United States of America by A. J. Requier, esq., their attorney, as the said defendant by his attorneys, and a jury being called to try the issue joined between the parties, came, to wit, A. M. Elgin, P. Duvall, Alanson Knapp, George W. Boyd, B. F. Roland, Daniel Robertson, John Hammond, S. S. Jennings, James Devine, E. Murray, T. H. Jenks and William Hall, twelve good and lawful men, who being duly elected, tried and sworn:

Whereupon, by consent, it is ordered that the jurors aforesaid be adjourned, and the cause continued until to-morrow.

And on the 8th day of January, A. D. 1858, being another day of the said term last mentioned, the following proceedings were had herein, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
CHARLES LE BARON. } 3,259.

This day came the parties by their attorneys, and the jury empanelled and sworn herein on yesterday this day appeared in open court, and having heard the evidence, upon their oaths do say: We, the jury, find for the defendant. It is therefore considered by the court that the plaintiffs take nothing by their writ, and that the said defendant go thereof hence without day, &c.

And afterwards, to wit, on the 14th day of January, A. D. 1858, being another day of said term last mentioned, the following further proceedings were had herein, to wit:

THE UNITED STATES
vs.
CHARLES LE BARON.

A bill of exceptions, taken by the plaintiffs, to the opinion of the court on the trial of this cause at the present term, was signed and sealed by the court, and ordered to be filed and made a part of the record in said cause.

Bill of Exceptions.

In the Circuit Court of the United States for the 5th judicial circuit and southern district of Alabama.—December Term, 1857.

THE UNITED STATES OF AMERICA, Pl'ffs,
vs.
CHARLES LE BARON, Defendant.

Be it remembered, that on the trial of this cause, the attorney for the plaintiff gave in evidence the original bond sued on, (all of which except the names, places, date and amount, was printed,) a true copy whereof is annexed as a part of this bill of exceptions, and marked A.

Bond A.

Know all men by these presents, that we, Oliver S. Beers, of Mobile, in the county of Mobile, State of Alabama, and Charles Le Baron and George N. Stewart, are held and firmly bound unto the United States of America, in the just and full sum of ($20,000) twenty thousand dollars, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of July, in the year of our Lord one thousand eight hundred and fifty, (1850.)

The condition of this obligation is such, that whereas the above

bounden Oliver S. Beers is deputy postmaster at Mobile, aforesaid: Now if the said Oliver S. Beers shall well and truly execute the duties of the said office according to law and the instructions of the Postmaster General, and faithfully once in three months, and oftener if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage, in the manner prescribed by the Postmaster General of the United States for the time being, and shall keep safely without loaning, using, depositing in banks, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise, at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed, and shall also faithfully do and perform, as agent and depositary for the Post Office Department, all such acts and things as may be required of him by the Postmaster General, and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, bills, bonds, notes, drafts, receipts, and other vouchers which he, as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department, then the above obligation shall be void.

(Signed) OLIVER S. BEERS, [SEAL.]
CH. LE BARON, [SEAL.]
GEORGE N. STEWART. [SEAL.]

Witness—
FRANCIS DAVID,
ROBERT M. SANDS.

STATE OF ALABAMA, *ss.*

I hereby certify, that the securities above named, and who have signed the foregoing bond, viz: Chas. Le Baron and George N. Stewart, are severally responsible and sufficient to insure the payment of the entire penalty named therein. Witness my hand this first day of July, A. D. 1850.

(Signed) JOHN GAYLE,
Judge District Courts U. States for Alabama.

Memorandum in pencil on back of Bond.

Bond and Oath received, and Commission sent, July 15th, 1850.

Which being read, the defendant thereupon insisted on having read also to the jury, as evidence, an endorsement made with a lead pencil on the said bond, without signature, and without proof by

whom the endorsement was written, in the words and figures following, to wit: "Bond and oath received, and commission sent, July 15th, 1850;" to the reading of which as evidence, plaintiffs by their counsel objected; and the objection was overruled by the court, and the pencil endorsement read by the defendant as evidence to the jury, to which ruling of the court plaintiffs then and there excepted.

Plaintiffs then introduced the commission dated the 22d day of April, in the year eighteen hundred and fifty, and signed by the late President of the United States, Zachary Taylor, to said Oliver S. Beers as deputy postmaster of the United States at Mobile, Alabama, under appointment by and with the advice and consent of the Senate of the United States for the term of four years, unless the President of the United States for the time being should be pleased sooner to revoke and determine his commission, *proved* that on and after the first day of July, 1850, and until the 6th day of February, in the year 1853, said Beers was in office, and acting as deputy postmaster at Mobile, and that he became a defaulter as alleged in the assignment of breaches of the condition of the bond, and to a large amount, during the latter part of the time when he was holding the office under the appointment by and with the advice and consent of the Senate, and within two years before this suit was brought. The amount of said default was established by a duly certified Treasury transcript of his accounts, certified *certified* by the Auditor of the Treasury for the Post Office Department, on the third day of December, A. D. 1853, a true copy whereof is hereto annexed as a part of this bill of exceptions, and marked B.

DR. *Oliver S. Beers, late P. M., Mobile, Alabama, in acc't with the U. States.* CR.

		To balance due on his quarterly returns as P. M., from July 1 to Sep. 30, 1850	$4,371 83	1850, July	1	By d'ft in favor of J. J. Thomason	$230 16
	1850, Oct.	29 Am't rec'd of Geo. W. Robbins	1 22	"	9	Do R. B. Alexander	501 08
		Oct. 1 to Dec. 31, 1850	5,241 85	Aug.	7	Do Rich'd Prince	63 31
		1851, Feb. 27—D'ft on J. A. Hammack	13 92	"		Do R. B. Alexander	250 00
		Jan. 1 to March 31, 1851	6,748 22	Oct.	17	Do Gallagher & Chidester	69 52
		1851, May 14—Balance transferred from late acc't	1,899 67	"		Do Alvis Davis	240 99
		April 1 to June 30, 1851	5,518 57	"		Do D. Maggard, ass	220 29
	A	1852. Nov. 5—This sum rec'd of J. Robinson, July 16, 1852	256 72	"		Do P. Williams, "	176 00
		1852, Sept. 18—Am't deposited by W. Walker	387 40	"		Do F. C. Ewers, "	302 89
		July 1 to Sept. 30, 51	3,429 09	"		Do P. Williams	57 37
		1851, Dec. 19—Draft on E. P. Brown	27 00	Nov.	12	Do Joseph Easley	82 19
		Oct. 1 to Dec. 31, '51	3,916 70	"	18	Do A. A. Bryant	155 36
		Jan. 1 to Mar. 31, 1852	4,330 04	"		Do Allen & Powell	487 09
		Apl. 1 to June 30, 1852	4,480 21	"		Do Sam'l Freyer	122 34
		July 1 to Sep. 30, 1852	2,675 85	"		Do Malind. Dawson	14 59
		Oct. 1 to Dec. 31, 1852	5,276 95	"		Do J. W. Portis	69 67
		Jan. 1 to Feb'y 5, 1853	2,500 01	"		Do Duncan & Hart	39 06
				"		Do J. B. Dixon	37 55
				"	21	Do Jas. Thornton	465 29
				"		Do A. A. Connella	277 56
				"		Do J. D. Riggs	54 00
				"	23	Do J. R. Powell	495 25
				"	26	Do Wilkins & Harrison	380 44
				"	30	Do O. Eastland	95 58
				"		Do S. M. Wheeler	85 46
				"	23	Do J. D. Harper	203 00
				1851, Jan.	7	Do W. Nicholson	29 98
				"	10	Do D. E. M. Tally	397 47
				"		Do L. M. Simpson	109 50
				"	29	Do C. V. Fortune	337 40
				Feb.	13	Do do	135 87
				"	18	Do J. R. Powell, ass	75 00
				"		Do Ventees Sykes	26 25
		Amount carried forward	51,075 25			Amount carried forward	

ACCOUNT OF O. S. BEERS—Continued.

Amount brought forward.....	51,075 25		Amount brought forward.....		.....	
		1851, Feb. 19	By d'ft in favor of	A. A. Connella.....	328	23
		"	Do	A. Woodward.....	88	64
		"	Do	Duncan & Hart	52	90
		"	Do	J. B. Dixon.....	37	61
		"	Do	S. M. Wheeler.....	95	56
		"	Do	John Owens	144	22
		"	Do	R. S. Brasher.....	81	25
		" 26	Do	J. A. Fortune.....	681	14
		"	Do	do	752	04
		"	Do	Jas. Lynch.....	43	75
		"	Do	A. W. Sorsby.....	25	45
		"	Do	Robt. Ford.....	43	75
		"	Do	J. D. Harper.....	180	69
		Mar. 1	Do	Gonzales & Quiggles.	231	75
		"	Do	N. L. & D. Anderson	115	34
		" 3	Do	M. S. Alexander.....	90	41
		" 4	Do	N. L. Anderson	20	58
		"	Do	Carter & Acree.....	30	89
		"	Do	Knox & Round.....	52	69
		"	Do	Malinda Dawson.....	13	42
		"	Do	Jas. Thornton.....	463	47
		"	Do	Jno. W. Portis.....	136	49
		" 5	Do	J. L. Owen.....	31	75
		"	Do	F. Harnell	44	63
		"	Do	C. V. Fortune.....	352	89
		"	Do	H. M. Round.....	69	60
		" 11	Do	Wm. Nicholson.....	33	30
		"	Do	Jas. Houston.....	182	53
		" 21	Do	Wm. H. White.....	20	89
		April 1	Do	C. C. Langdon.....	77	00
		May 6	Do	F. Harwell.....	53	85
		" 9	Do	J. B. Dixon.....	50	91
		"	Do	Jas. Houston.....	74	02
		" 14	Do	R. Willoughby.....	30	00

			" 15	Do	J.W. Portis	126 40
			" 16	Do	Gonzales & Quiggles.	225 75
			"	Do	N. L. Anderson	25 96
			"	Do	Carter & Acree	49 99
			" 19	Do	J. A. Fortune	454 73
			" 20	Do	Wm. Nicholson	37 70
			" 9	Do	Malind. Dawson	10 40
			"	Do	S. M. Wheeler	95 22
			" 30	Do	Deposit	18 52
			July 22	Do	James Lynch	140 29
			Aug. 9	Do	M. S. Alexander	105 68
			"	Do	Jno. McInnis	162 54
			"	Do	H. M. Round	105 42
			"	Do	Thos. J. Clay	337 22
			"	Do	F. Harwell	53 08
			" 11	Do	Jos. Houston	101 69
			"	Do	J. A. Fortune	705 65
			"	Do	Jas. Thornton	497 97
			"	Do	Malinda Dawson	7 94
			"	Do	Jno. B. Dixon	38 60
			"	Do	R. Jamison, jr	512 00
			Aug. 18	Do	N. L. & D. Anderson.	68 33
			" 19	Do	Carter & Acree	34 70
			"	Do	Wm. Nicholson	32 01
			"	Do	G. C. Powell	69 26
			"	Do	J. H. Callaway	26 80
			" 21	Do	J. R. Powell	747 56
			" 26	Do	Jno. B. Portis	117 69
			Sep. 3	Do	James Lynch	43 75
			Dec. 8	By short payment on draft on J. A. Hammond		12 03
			" 31	By am't stamps redeemed		51 60
			Nov. 3	By d'ft in favor Malind. Dawson		10 45
			"	Do	Jas. Thornton	500 51
			" 5	Do	H. M. Round	153 69
			"	Do	F. Harwell	64 88
			" 6	Do	R. H. W. Bigger	71 88
Amount carried forward		51,075 25	Amount carried forward			

ACCOUNT OF O. S. BEERS—Continued.

Amount brought forward.....	51,075	25			Amount brought forward.....	.....	
			1851, Nov.	6	By d'ft in favor of G. W. Magard.....	91	85
			"		Do M. Patterson.....	21	15
			"		Do J. H. Calloway	41	12
			"		Do G. C. Powell.....	63	22
			"		Do S. M. Wheeler.....	93	25
			"		Do A. Pickens.....	3	82
			"	13	Do Jno. R. Dixon.....	53	99
			"		Do J. W. Portis.....	113	16
			"	14	Do Jas. Lynch.....	43	05
			"		Do J. Reddick.....	83	40
			"		Do A. W. Sorsby.....	43	79
			"		Do M. S. Alexander.....	177	14
			"		Do W. H. White.....	12	34
			"		Do Knox & Round.....	445	37
			"		Do Carter & Acree.....	43	04
			"		Do Wm. Nicholson.....	34	60
			"	17	Do C. V. Fortune.....	477	71
			Dec.	1	Do Gonzales & Quiggles.	231	75
			"	24	Do N. L. Anderson.....	8	50
			1852, Jan.	6	Do G. D. Fisher.....	56	59
			Feb.	17	Do Malinda Dawson.....	16	94
			"		Do Andrew Perkins.....	7	82
			"		Do John B. Dixon.....	60	76
			"		Do William Nicholson...	38	82
			"		Do Carter & Acree.....	43	05
			"		Do S. M. Pheeler.....	96	59
			"		Do G. C. Powell.....	68	03
			"		Do F. Harwell.....	63	64
			"		Do Syd. Moore, att'y....	133	63
			"		Do J. W. Portis.....	145	78
			"	19	Do R. H. W. Bigger.....	83	29
			"		Do R. H. Brasher.....	53	78
			"		Do M. Patterson.....	20	35
			"		Do D. Medder.....	20	07

				"		
				"		
				" 25	Do	A. W. Sorsby..... 54 47
				"	Do	V. Sykes..... 21 25
				"	Do	E. L. Selph..... 12 13
				" 29	Do	Sam'l Bishop..... 53 08
				"	Do	G. D. M. Connell.... 225 00
				"	Do	Duncan & Hart..... 73 61
				Mar. 15	Do	Jas. Lynch..... 43 75
				"	Do	N. L. Anderson..... 13 48
				Ap'l 16	Do	J. Wilkinson..... 21 51
				" 29	Do	J. B. Dixon..... 47 80
				"	Do	M. Patterson..... 20 82
				"	Do	F. Harwell..... 54 39
				" 30	Do	Carter & Acree..... 65 55
				"	Do	S. M. Wheeler..... 88 68
				"	Do	G. C. Powell..... 67 72
				"	Do	Wm. Nicholson..... 30 76
				"	Do	A. W. Sorsby..... 49 34
				"	Do	Malinda Dawson..... 17 73
				"	Do	A. Pickens..... 7 59
				May 1	Do	R. H. Brasher..... 54 25
				"	Do	N. L. Anderson..... 32 18
				"	Do	Duncan & Hart..... 70 01
				" 10	Do	Joel Barnum..... 33 26
				"	Do	Wm. Johnson..... 58 00
				" 15	Do	J. H. Calloway..... 113 22
				June 3	Do	Josh. Jones, jr..... 37 26
				" 24	Do	T. Sandford & Co.... 21 00
				July 2	Do	Joel Barnum..... 46 00
				" 3	Do	A. B. McCarty..... 115 99
				" 24	Do	R. H. Brasher..... 51 10
				"	Do	Andrew Pickens..... 6 40
				"	Do	Malinda Dawson..... 16 85
				"	Do	Wm. Nicholson..... 51 45
				"	Do	Dan'l Medder..... 110 00
				"	Do	Wm. H. Roberts..... 197 06
				"	Do	W. H. White..... 31 35
				"	Do	M. Patterson..... 18 88
Amount carried forward.....		51,075 25		Amount carried forward.....		

ACCOUNT OF O. S. BEERS—Continued.

Amount brought forward.....	51,075 25		Amount brought forward.....	.....	
		1852, July 24	By df't in favor of	Jno B. Dixon.....	61 30
		"	Do	E. P. Jones.....	43 53
		" 26	Do	John Owens.....	47 04
		"	Do	Sam'l Fryer.....	114 65
		"	Do	F. Harwell.....	60 13
		"	Do	J. H. Powell.....	16 95
		" 29	Do	J. W. Portis.....	126 54
		"	Do	J. L. Owen.....	30 55
		"	Do	W. W. Carlisle.....	87 39
		"	Do	G. C. Powell.....	67 56
		"	Do	Carter & Acree.....	103 75
		"	Do	Wm. M. Perryman..	68 93
		Aug. 3	Do	Duncan & Hart.....	65 53
		"	Do	R. H. W. Bigger.....	75 68
		" 7	Do	Sam'l Bishop.....	58 84
		" 21	Do	N. L. Anderson.....	21 19
		"	Do	J. Reddick.....	20 19
		" 28	Do	J. H. Calloway.....	27 81
		"	Do	Jas. Lynch.....	37 77
		" 31	Do	Sam'l M. Wheeler...	91 46
		Sept. 8	Do	John J. Humphreys.	23 00
		" 17	Do	A. B. M. Carty.....	95 61
		Nov. 12	Do	W. H. White.....	17 17
		"	Do	F. Harwell.....	13 24
		"	Do	R. H. W. Bigger.....	77 62
		"	Do	G. C. Powell.....	66 54
		"	Do	S. M. Wheeler.....	94 28
		"	Do	Duncan & Hart.....	69 87
		"	Do	M. Dawson.....	20 54
		"	Do	Wm. Nicholson.....	38 36
		"	Do	A. W. Sorsby.....	48 52
		"	Do	D. Lookwight	112 78
		"	Do	Joel Barnum.....	78 72
		"	Do	R. H. Brasher.....	50 08

			"	16	Do A. Y. England.....	8 21
			"	19	Do J. W. Portis.....	125 75
			"	26	Do Carter & Acree.....	85 87
			Dec.	15	Do A. Y. England.....	100 00
					By this sum paid E. H. Metcalf, sp'l agent, per letter dated 8 Feb., '53.....	6,171 43
					By this sum paid E. H. Metcalf, sp'l agent, per letter dated 21 Feb., '53....	100 00
					Balance	20,543 52
		$51,075 25				$51,075 25
To balance.....	$20,543 52					
" interest from Feb. 5, 1853.						

OFFICE OF THE AUDITOR OF THE TREASURY FOR THE P. O. DEPARTMENT.

I hereby certify the within and attached to be a true and correct transcript of the account of Oliver S. Beers, late postmaster at Mobile, Alabama, as audited and adjusted at this office.

In testimony whereof, I have hereunto signed my name and caused to be affixed my seal of office, at Washington, this third day of December, A. D. 1853.

WM. F. PHILLIPS,
Auditor of the Treasury for the P. O. Department.

Among the moneys received by said Beers, in respect to which he was charged as a defaulter, was a balance transferred from his account as late postmaster to his debit as postmaster, by and with the consent of the Senate as aforesaid, in respect to which the plaintiffs by their counsel offered in evidence a writing, dated Mobile, April 9th, 1851, and signed by George N. Stewart and C. Le Baron, a true copy whereof is hereto annexed to this bill of exceptions, and marked C.

Copy of writing signed by Stewart and Le Baron, and marked C.

Oliver S. Beers, postmaster at Mobile, having been appointed and subsequently confirmed by the Senate, and having, in compliance with the regulations and rules of the department, transferred a balance of thirty-six hundred and twenty-six and $\frac{84}{100}$ dollars from him due, as per account, before the time of the confirmation, to the debit of his new account since the confirmation, we, the sureties of the said Oliver S. Beers, do agree to the said transfer, and acknowledge ourselves bound as sureties for said Beers, to account for said balance so transferred as a proper debit, and admit the transfer is made with our consent, as sureties, under the new confirmation appointment.

Mobile, April 9, 1851.

GEORGE N. STEWART,
C. LE BARON.

Which writing was so offered not as evidence of any new liability contracted, but as an admission merely, dispensing with other proof of the legality of said transfer, and further as an estoppel upon the defendant; but this evidence, upon objection thereto from the defendant, was ruled out by the court, to which ruling the plaintiffs then and there duly excepted. It was admitted by the defendant that the defendant and the other surety of Beers had acknowledged to E. H. Metcalf, a special agent of the government for the examination in February, 1853, of the defaults of the said Beers, that the bond in suit was given with the view and intent of procuring for Oliver S. Beers the appointment, by and with the advice and consent of the Senate.

On the part of the defendant the said Oliver S. Beers was offered as a witness. His competency was duly objected to by the plaintiff, whereupon a release was executed to him by the defendant; and the court having thereupon ruled he was competent to testify, the plaintiff then and there duly excepted to said ruling. The defendant then proposed to prove by said Beers, that in April, of the year 1849, he was appointed deputy postmaster at Mobile, by a commission (which was not produced) from the late President Zachary Taylor, under an executive appointment; but to the admission of this testimony the plaintiff by his counsel excepted, and insisted

that the record evidence of such appointment, or a copy thereof, ought to be produced; but the witness having deposed that the commission he received had been destroyed at the burning of his house, the court permitted him to testify as aforesaid; to which ruling the plaintiffs then and there excepted.

Said Beers further testified, that the bond in suit was signed by the parties on the first day of July, 1850, at Mobile, but was not sent until the next day, or the day after, when it, and also his oath of office under the last appointment, by and with the advice and consent of the Senate, were enclosed together and sent to the Postmaster General by mail. He further testified that he received the commission under the second appointment from about the twentieth to the last day of July, 1850; and he further stated that this bond was approved at Washington, on the 15th July, 1850. Upon cross-examination said Beers deposed, that the time then usually occupied by the United States mail in going from Mobile to Washington was five days.

Plaintiffs then proposed to establish by witness that the bond in suit was made for the express purpose, on the part of those who signed it, of securing to him the office of said deputy postmaster under the last appointment, by and with the advice and consent of the Senate. Whereupon the defendant, by his counsel, expressly stated that he would interpose no objection to the adduction of said proof, and the witness then deposed accordingly. Upon this evidence the court charged the jury, "that if the bond in suit was signed in Mobile on the first day of July, 1850, and Beers was then deputy postmaster under an executive appointment, and if they believed that it was not approved of by the Post Office Department until the 15th of July, 1850, then under the state of the pleadings and the issue joined in this case the defendant was entitled to a verdict; that the plaintiff might commence a new suit and declare a right and recover, even after their verdict in favor of defendant, but as the case was stated on the record the plaintiff could not recover if the bond did not take legal effect until the 15th July, 1850."

To this charge the attorney for the United States excepted, and requested the court to charge the jury that as the defendant had admitted the due execution of the bond by their pleadings on the first day of July, 1850, they could not be permitted to question the fact so admitted, which the court refused to give; and thereupon the plaintiffs' counsel excepted.

The defendant's counsel then requested the court to charge as follows: "If the jury believe that the bond now produced before them was signed at Mobile on the first of July, 1850, and sent to Washington, and that it was approved there by the department on the 15 July, 1850, as stated in the evidence and endorsed on the bond, then the obligation is a different one from that alleged

and set forth in the declaration and replication of the plaintiffs to the third plea; and as the liability would be different from the one set forth in the issue joined on the third plea, then if they believe the bond was so approved on that day (the 15th July, 1850,) or on any other day after the day of its date, they must find the issue for the defendant, on that plea." Which charge the court gave as requested; to which the plaintiffs, by their counsel, then and there excepted.

Thereupon one of the jury asked the court whether they, the jury, "had any discretion in the matter?"

To this the court replied, that under the pleadings in the cause, if they believed the bond was not approved by the department until the 15th July, 1850, then they had no discretion, if they had any respect for the opinion of the court, but that it was for them to decide on the facts, and to take the law from the court, and if the fact be that the bond was not approved until the 15th, then they should find for the defendant.

The plaintiffs' counsel duly excepted to each and all of the instructions so given by the court, as well as to his refusal to charge as requested; and thereupon the court signed and sealed this bill of exceptions in open court during term time.

(Signed) JOHN GAYLE, *Judge.* [SEAL.]

This bill of exceptions will apply to the case against Charles Le Baron, as well as that of G. N. Stewart.

JOHN GAYLE.

Filed 14th January, 1858.

GEO. E. HOLT, *Cl'k.*

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States to the Judges of the Circuit Court of the United States for the southern district of Alabama, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Alabama before you, between the United States, plaintiffs, and Charles Le Baron, defendant, manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the

first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, the fifth day of February, A. D. 1858.

GEO. E. HOLT,
Clk C. C. Sou. Dist. Ala.

Citation in Error.

UNITED STATES OF AMERICA,
Southern District of Alabama.

To Charles Le Baron, or Messrs. Dargan & Hall, George N. Stewart, and Hamilton, his attorneys, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Alabama, wherein the United States are plaintiffs, and the said Charles Le Baron is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the plaintiffs in that behalf.

Witness the Hon. John Gayle, one of the judges of the circuit court aforesaid, the 5th day of February, 1858.

JOHN GAYLE, *Judge.*

Marshal's Return.

Rec'd 11th Feb'y, 1858, and executed the same day.

C. M. GOUBOLD, *U. S. M.*

I, Richard B. Owen, clerk of the circuit court of the United States for the southern district of Alabama, do hereby certify that the foregoing pages numbered from one to seventy-seven, inclusive, contain a full, true, and perfect exemplification of the record and proceedings had in a certain cause lately pending and determined therein, wherein the United States were plaintiffs and Charles Le Baron was defendant, as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Mobile, this seventeenth day of May, A. D. 1858. [L. S.]

R. B. OWEN,
Clerk C. C. Sou. Dist. Ala.

Filed 8th November, 1858.

Supreme Court of the United States,

DECEMBER TERM, 1860.

THE UNITED STATES,

vs.

CHARLES LeBARON.

SAME,

vs.

GEORGE N. STEWART.

Argument for Defendant in Error.

BY GEORGE N. STEWART.

Supreme Court of the United States.

THE UNITED STATES
vs.
CHARLES LEBARON.

SAME, Vs.
GEORGE N. STEWART.

THESE two cases are precisely similar, and are now here on a second writ of Error. They were actions against sureties of a Postmaster on his Bond.

This Court settled the legal effect and operation of the Bond by its decision on the first writ of Error (see 19 Howard 73.) The trial since was conducted in conformity with that decision.

We consider that nothing is now properly open for review, except the proceedings had since the reversal, when a *venire de novo*, simply, was ordered. This we understand to be the settled law of this Court. (12 Peters R., 488; 10 Wheaton, 443; 20 Howard, 467.)

The questions arise on a Bill of Exceptions, by which it appears that several points were reserved in relation to evidence identical with those presented on the first appeal. They were not then sustained, nor declared to be grounds for reversal. The first decision was held to be erroneous only in the charge of the Court; no other error was specified; hence we say these questions are not now open, so far as they are the same. Such must be the rule, else a case might be brought up, successively, as many times as there were points made, and reversed, successively, on one point at a time. This would be an unsufferable evil.

Again, there are points reserved on questions, the decision of which, either way, could have no influence on the result, such as a question relating to the *quantum* of recovery, if the plaintiff was entitled to recover. But as the decision turned on the right to recover, the Court would not reverse on such immaterial ground, if the controlling decision was found to be correct.

The Court did not decide that there was not a good cause of action; the merits of the claim were not investigated; the defendant did not introduce his evidence to any extent, except to make the point that the contract exhibited by the proof was not the one embraced by the pleadings, and that it did not maintain the issue joined.

It is very evident that a party cannot set forth a specific demand on the record, and when the defendant pleads to it, and joins issue on it, then prove a demand materially different, and still be entitled to a verdict affirming that the claim he has put on the record is true. In deciding that the issue was not established by the proof, the Court ruled in accordance with the law and decisions of this Court, and correctly, beyond any doubt.

The evidence was variant from the allegations in the pleadings, *variant* from the *instrument* in writing relied on as the foundation of the demand, *variant* from the *contract* as set forth, and *insufficient* to prove all the material and indispensable allegations necessary to be proved to determine the issue for the plaintiff.

The declaration charged that the defendant at Mobile, on the 1st of July, 1850, by his Bond under his seal, *acknowledged* himself to be bound to the United States in the sum of $20,000, and sets forth a condition, which was that Beers should properly discharge the duties of Postmaster at Mobile, reciting that he was Postmaster; but neither the declaration, nor the Bond set forth on oyer described the term of office he held, when it commenced, or when it terminated. The

extent of time covered by the duty did not appear. Breaches were assigned, some on the 10th of July, 1850, and others on the 1st July, 1850, &c., after the making and *delivery* of the Bond, and from thence to the commencement of the suit.

By the third plea, the defendant pleaded that on the 1st July, 1850, Beers was in office as Postmaster, under an Executive appointment made in 1849, to continue till September, 1850, and then to terminate; and that during the time of his said office so held, no breach was committed.

The plaintiff then replied that on and after the delivery of the Bond, to wit, on the 1st July, 1850, Beers was not in office under the Executive appointment, as he alleged, but was in office under a second appointment for four years, with Senate confirmation, made on the 22d April, 1850. That the Bond was made on the day of its date, for that office, and that the breaches occurred after the making and delivery of the Bond, as aforesaid (1st July, 1850).

The defendant filed a general rejoinder, reaffirming his third plea, and reasserting that at the time of the execution of the Bond, Beers was not the Postmaster in the *manner* and *for the term of office* set forth in the replication (the 2d Term), but was Postmaster by Executive appointment, as set forth in said third plea, and tendered issue on this, in which there was a joinder by the plaintiff.—(See pages 16 and 17 of the Record.)

It is true that the replication asserts that the Bond was made for the proper discharge of the duties of the second office, and the rejoinder says it applied to and covered only the time set forth in his third plea, and no other. But these are only the legal conclusions of the pleaders, and not averments of fact. These allegations are not *traversable* nor *issuable*, involve questions of law only depending on the facts alleged and proved, which alone can determine the duties in-

volved by the contract. These assertions, then, on both sides, are wholly immaterial.—(Gould on Pleading, page 183, sec. 29.)

The plaintiff undertook, therefore, by his pleadings, to establish before the Jury, four propositions.—1. That the Bond was made and delivered on the 1st of July, 1850, and was operative from that day.—2. That Beers was in office on that day under the second appointment.—3. That the senatorial term of office, or second term, embraced the time as early as the 1st July, 1850.—4. That as a consequence the defendant was liable for moneys received by the Postmaster, on the 1st and 10th of July, 1850.

It will be observed that the time of *delivery* of the Bond is not expressly averred in the declaration, nor indeed is any delivery at all expressly averred. It is charged merely that on the 1st of July, the defendant *acknowledged* himself to be bound by his Bond. The assignment of breaches recites receipts of money, and acts after the making and *delivery* of the bond, *to wit, on the 1st of July.* All facts essential, should be expressly alleged. (Gould's Pleading, p. 152, sec. 66.) Still it is held, as to this particular fact, that where the making and date of the specialty are set forth, this will be taken to imply a *delivery* on the day of the date, for the purposes of the declaration. (See G'ld's Pleading, 92, sec. 67-69.) But in such case the plaintiff will be confined for delivery to such time so set forth by implication, and he cannot, when he has omitted the direct averment of a delivery other than at the time set forth as the date of the writing, depart from that date and show a different date of delivery, because it would be a departure. (*Ibid.*) So the plaintiff, having impliedly averred a delivery on the 1st of July, and given oyer of the bond without an averment of a different day, cannot depart from that day, but is confined to it. (Gould's Pleading, 99, sec. 81.) All pleadings are to be taken most strongly

against the party pleading, and any omission is at the pleader's peril. [Gould's Pleading, 153, sec. 169.] All matters must be pleaded according to their legal effect. [Gould, 166, sec. 174.] And if the legal effect is not stated, when the evidence is shown, it is fatal. [Gould, 157, sec. 176.] The deed exhibited on profert must conform to the declaration. [Gould, 450, sec. 58.] And the deed given in evidence on the trial must conform precisely to that set forth on oyer. [Greenleaf on Evid., 93, chap. 5, sec. 69.] Therefore the plaintiff was bound to stand or fall on the date he set forth in his declaration and on oyer. The declaration sets forth the Instrument sued on. It is the original and controlling pleading, and the leading one, no subsequent pleading can vary from it; if it does, it is a departure. [Gould, 163, sec. 168.]

Another fact was involved in the issue which the plaintiff was bound to *aver* and to *prove;* this was that the Bond was approved on the 1st July, 1850; and furthermore, that the oath of office had been filed in the General Post Office on that day. These are made by the Statute indispensable requisites to the vesting of the second office, and till it vested in the Postmaster, the sureties to the new office were in no manner responsible; but the old ones were on their bond.—[19 Howard, 73]. The rule of law is, that all facts essential to complete and create the liability must be expressly charged.—[Gould, 152, sec. 166 : page 175, sec. 12, 13, 14, 15.—2d. Greenleaf on Evidence, 341, section 294. 11, Wheaton's R., 171.] There were no averments of either of those facts, and yet, unless they existed, there was no liability in the defendant. The absence of those averments might have caused the rejection even of proof of these facts if offered on the trial, had the objection been made, as no proof is admissible when there is no averment in the declaration of the fact sought to be proved.—[Gould 172, sec. 7.] But at all events, the omission

of the averment cannot excuse the want of proof of all material requisites to fix the liability on the trial of the issue, else a party would recover without cause of action, and derive an advantage from bad pleading.

The proof which the plaintiff produced before the Jury, was: the Bond and evidence of its execution on the first of July; the commission dated the 22nd April, for four years; that Beers acted as Postmaster on the 1st July, 1850; and that monies were received by him from the 1st of July, the 10th, &c., up to the year 1853. The plaintiff refused to read the endorsement on the Bond showing when the Bond was approved and the oath of office filed, because it showed those acts to be at a time fatal to his issue. There was then no proof of those facts offered by him. The plaintiff therefore failed on his own proof to show a liability in the defendant, either as laid or in any other manner.

The defendant then introduced his proof, which was not controverted or contested; and then it appeared that the Bond was not accepted nor approved till the 15th of July; that Beers held another office of a temporary character, under an appointment made in 1849, and which continued in force till superseded by the second one, and that the effect of the decision of the Court was that the second office did not commence till the 15th of July; then it was manifest that the issue made by the plaintiff, and on which the case was put, that Beers was in office on and after the 1st of July under the second commission, was falsified, and must be determined for the defendant.

It is clear, therefore, that not one of the four propositions, above set forth, as undertaken to be proved, were sustained, when it was necessary that all of them should be.

There was a fatal variance, 1st. In the date of the Instrument; 2nd. In the description of the terms and extent of the contract between the parties, which was

sued on, and that shown to exist. The liability on each would cover different defaults, and a contract is an entire thing and must be proved in all its parts, terms, times and dates, exactly as laid, else it is not the same but a different contract.

As a mis-description of the *paper* or *writing* made the foundation of the action, the variance was fatal. A wrong date is a fatal mis-description, whether the day is material to the action or not, because it does not identify the Instrument.—Cooke v. Graham, adm., 3 Cranch, 229; Gould's Pldg., 61, sec. 67.

We found this proposition on another one, which is that the declaration is to be taken as having described the paper relied on according to *its legal effect* and not its mere *tenor*, for such is the law. In this case time is a material part of the contract, though in many cases time laid in pleading is not material. As a mere question of description of the paper, as the paper took effect at a time different from that indicated by its face, and the time of its obligatory force and true legal date was within the knowledge of the plaintiff, the legal date should have been averred, because the plaintiff must in all cases declare according to the legal effect.

Next, as a mis-description of the subsisting and mutual duties and obligations of contract between the parties, the contract proved was fatally variant from that charged. They covered different times, and conseqently different defaults. By the one salary was due to the Postmaster from the 15th of July, by the other it would be due from the first of July. Time of date was therefore material.

In describing the contract, as well as describing the paper merely, the plaintiff was bound to state the true time, according to the legal effect of the contract. —Gould's Pldg., 90, sec. 66, p. 92; sec. 67, 69.

Where time is connected with the terms and affects the duties of the contract, it is material.—Gould,

90, sec. 66; 7 Cranch., 208; Ibid, 408. The difference was therefore in a material point, changing the extent of liability and therefore fatal.

The contract must be proved precisely as charged, and the legal effect must be the same. The words in the contract must have the same construction as in the pleadings.—7 Cranch, 414.

In Sheehy v. Mandeville, (7 Cranch, 208,) the declaration charged a note, with its date, but was silent as to the time of payment. The legal effect of the declaration was like here by an implication that it was payable presently, and there was a judgment by default, which admitted the note and the duty of payment. The note produced on inquiry of damages appeared payable sixty days after date. Proof was offered that this was in fact the note sued on; and, as in this case that no other one was intended, and that the omission to state the time for payment was by mistake. All this was rejected, and the note was held variant and excluded, not that it differed from the declaration so far as it described it, but it did not correspond with the legal effect of the description, which was an implication binding on the party consequent on the omission to set forth any day, as in this case concerning the day of delivery.

In the case of Cooke v. Graham's adm., 3 Cranch., 229, the Bond declared on was dated the 3d of Oct.; on Oyer it appeared to be dated the 3d of January. When it was really delivered did not appear. The defendant pleaded to the merits, and the date really was immaterial to the condition. But there was in the course of the pleading a special replication to a bad rejoinder. The Court held that the demurrer reached back; and the variance between the declaration and Bond set out on Oyer was fatal to the action. The same state of case exists here, and the demurrer should be held to defeat the action, as the declaration did not contain averments enough.

The case of *Williams* vs. *Jones*, 5 Barnwell & Cresswell, 108, was in principle precisely similar to this, in several respects. An attorney agreed, for a certain sum, with a party, to take his son in partnership for ten years, in certain law practice; the contract was dated the 11th November, 1822, and no time was specified when the partnership should commence. Assumpsit was brought on the contract for the sum agreed to be paid. The contract was described as made, and was proved. But the witness also proved that the son was not licensed as an attorney till April, 1823; and this made the contract unlawful and void, as it was to practice law without license. The defendant then offered proof that the contract did not go into effect till after the son was licensed. This last evidence was rejected, and the plaintiff non-suited. The non-suit was held to be right—the contract was silent as to when it should take effect—the implication and legal construction was, that it went into effect immediately. The declaration was also silent on this point, and was construed, by its legal effect, to imply the same effect in præsenti, and hence it was argued that the contract being silent as to its time of commencement, therefore the time could be shewn by parol evidence without contradicting the writing. The answer was, that if this was admittted the effect would be to vary the contract from the legal effect of that charged in the declaration and make a fatal variance. There the implication of time bound the party in his declaration, and the variance excluded the contract when the illegality was sought to be avoided.

The same result occurs in our case. The declaration is on a bond dated the first. By implication, this means delivery on that day. True, a delivery on another day may be proved by parol, because this is a special case of exception to the general rule, aud such proof is held not to contradict the instrument—(19 Howard,)—but when it is proved, the bond is varied,

and no longer conforms to the declaration nor to the profert, and is therefore fatally variant from both.

2. The court did not err in allowing the memorandum indorsed on the bond of the date of acceptance, and filing of oath of office to be read.

This is one of the points excepted to before. This Court passed on it, and did not sustain the exception. The case went back. The Court had ruled it out, no fault was found with this decision, and the point came up before the Court again. How was the Judge to rule? It must have been expected, of course, that it would be so ruled. We say the first decision was impliedly affirmed on that point.

But the decision was correct. It must be remembered that the paper came from the custody of the obligee, and the memorandum related to the plaintiff's own act. That this act was in the regular course of the business and duty of the Postmaster General, and the act recited conformed to all the other proofs and circumstances of the case. If offered against us, we could require proof of how it came there; but when claimed as evidence against the holder, it required no proof. Any credit found indorsed on a Bond must be allowed, unless the holder can shew it was improperly there, and he must explain it. (1 Greenleaf's Evid., 163—ch. V, sec. 122).

This evidence was corroborated by the evidence of Beers, who proved the same fact, and if it had been rejected, still the same fact stood proved in the cause. This evidence was indispensable to the plaintiff, for without it, he had no cause of action either within the issue nor outside of it.

3. The rejection of the agreement of the 9th of April, 1851, was proper.

This exception is subject to the same remark as the last, that it was presented here before, and not then sustained.

It was only parol evidence, offered to extend and

enlarge the scope of the condition of the sealed instrument, which cannot be allowed.—(2d Robinson's Practice, 25.) The agreement, if valid, was a substantive contract of itself, and could be sued on, but not as under seal, for it was not. It was without any consideration, and not being sealed, none was implied. No such contract existed when the Bond was made, and the plaintiff must recover, if at all, on the ground on which he first places his claim by his declaration, and no subsequent allegation would entitle him to present it.—(Gould's Pldg., 171, sec. 8.) There was no allegation nor breach in the declaration that would admit of such evidence, and nothing can be proved which is not alleged in the pleadings. A claim made under a sealed obligation cannot be proved by any parol agreement, and such cannot be substituted for evidence under seal, nor vary or enlarge the duties of a sealed contract. This would make the claim cover a term anterior to the term covered by the Bond, which the law would not authorise. A different obligation cannot attach to the bond in 1851, to what its obligation was in 1850.

There was no such item charged in the account as the writing recites. It speaks of a balance of $3626. 84c. already transferred to new account on the 9th of April, 1851. We find no such debit in the account; but find one for $1899.67c. charged in May from late account, but what account does not appear. It is not the same item, nor does it identify the Bond now sued on sufficiently to tack on this debt to it. It is an independent contract of itself by which the parties bind themselves as sureties that Beers shall account for said balance.

4. The question of the competency of Beers as a witness when he was released, requires no argument. He was clearly competent.

5. The commission of 1849 having issued to Beers, and having been destroyed after it was in his posses-

sion by fire, the fact, "that in April of that year he was appointed Post Master, by a commission from the late President, Zachary Taylor, under an executive appointment," was admissible as secondary evidence, and that is all the exception covers.

There are no degrees in secondary evidence,—(1 Greenleaf's Ev. sec. 84, *note* 2)--particularly where the party opposing it has the evidence in his possession which he calls for—[the record of the commission and of its issuance.] In such case we are not bound to rely on the record being free from error, it is in the custody of our adversary.

In Brown v. Woodman, 6 Carr and Payne, 206, the contents of a letter were allowed to be proved by parol without producing a copy, the opposing party having possession of the original, even though the party who offered the witness had a copy in his possession.

The rule relied on is not a strict one, and its application is a matter of discretion in the Court below. It has no application to documents of public notoriety which give authority to an officer.—Moore *et al* v. Fisher, 7 Carr and Payne, 115; King v. Inhabitants of Metherinoham, 6 Term Rep., 556. It is not necessary to produce the commission to prove that a person is a public officer—[1 Greenleaf's Evid. sec. 92]; and the rule does not apply where the fact is uncontroverted, nor where the evidence was to establish a collateral fact,—1 Greenleaf's Evid., sec. 89.

The evidence, indeed, was wholly immaterial, and its admission did not affect the issue. It was not at all material whether Beers held a first office or not. The question did not turn on that point; but the only material question was whether or not he was at the day duly entitled to act under the second appointment. It was on this second commission that the decision depended. The Court would not reverse on anything immaterial. This exception was also here before and much broader then than now.

The last point made by the Bill of Exceptions is that the Court "was requested to charge the jury that as the defendant had admitted by his pleading the due execution of the Bond on the 1st of July, he could not question the fact." The assumption made was unwarranted. The plea does not admit that the Bond was duly executed on that day, but says that Beers was Postmaster at Mobile on the day of the date of the Bond, meaning the date apparent and set forth in the Bond and plaintiff's pleading, the 1st of July. The most that could be made of the admission is that it is an *implied* affirmative in a traverse; but that does not aid the plaintiff, because it does not maintain *his plea* as laid.—Gould's Pldg., 398, sec. 40. It does not prove he was Postmaster under the second appointment, on the 1st of July. The making and delivery of the Bond operates nothing, if it is to be considered as an original Bond required to vest the new office of Postmaster in Beers. If so to be treated, it is no Bond till accepted and approved.—U.S. v. LeBaron, 19 Howard, 73. But if it was, as the plea contends, to be treated by its terms, as a *cumulative Bond* given by one already in office as an additional security (and the Postmaster-General had the power to require such,) then no approval was needed and none had been charged; the whole admission must be taken together. If the instruction had been given as asked for, it could not change the result; still the evidence was not sufficient to maintain the issue; and the same question was involved in the decision already made, because all the admissions of the pleadings were before the Court when its charge in chief was given, and were involved in the charge.

The evidence that the bond was intended for the second office has no effect. Its force and effect depends on what contract the parties actually did bind themselves by the writing to perform, not what they intended to do. This was settled at the former trial.

—19 Howard, 73; see also 8 Wheaton, 207,; 5, Barn. & Ald., 128–662; 5 Barn. & Cress., 108. If the Bond was accepted on the 15th of July as a bond for the second term, it took effect then. There was no admission of the defendant by his plea that could avail the plaintiff to establish *his* proposition.

As to the suggestion of a repleader, it is not presumable it will be urged here, and hardly requires notice. This is not a case for a repleader.

No repleader was moved for in the court below. This being an appellate Court, the question will not be entertained here.

A *venire de novo* is grantable only when the issue was immaterial and when the court could not give judgment on it either for one party or the other, supposing it found for either.—Gould's Pldg., 319, sec. 27; 509, sec. 30, 31.

It is distinguishable from an informal issue.—Gould, 319, sec. 28.

It is never awarded in favor of the one who commits the first fault in pleading. Here if the demurrer of the plaintiff to the third plea is carried into the declaration, it would defeat the action, as allegations *indispensable* to the liability are wanting.—Gould's Pldg., 152, sec. 165, p. 175, sec. 12. If there be a condition precedent required, it must be averred performed.—Gould, 175, sec. 13, 14, p. 172; sec. 7, 11. Where formalities are necessary they must be averred (2 Greenleaf, 341, sec. 294); and we have seen that approval and filing of the oath of office are indispensable, and they are not averred. This case differs in this respect from ordinary bonds where delivery merely is sufficient and acceptance presumed.

This Court has again declared what it often had before, that sureties are to be bound only by the strictest rules of law, and are entitled to favor; nothing will be sustained against them, nor will the Court go out of its way to reach them.—[19 Howard, 73.]

This Court having heretofore ordered a *venire de novo*, a repleader cannot be asked for. The issue, if immaterial, was as much so then as it is now. In a repleader the fault must be found not in the evidence but in the allegations of the issue. Here the party misdescribed his contract and could not prove it, as laid; that it is no cause for repleader. The issue he did join in was not true on his part, that is all. If the declaration does not show a good cause of action, a demurrer lies to it, and the action is defeated. No repleader can be awarded to amend a declaration.

For all these reasons, it is respectfully submitted that the Circuit Court did not err in rendering its judgment.

GEORGE N. STEWART,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 14.—December Term, 1860.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

GEORGE N. STEWART.

No. 15.—December Term, 1860.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

CHARLES LE BARON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

Brief on the part of the United States.

J. S. BLACK,
Attorney General.

SUPREME COURT OF THE UNITED STAETS.

THE UNITED STATES vs. GEORGE N. STEWART.

SAME vs. CHARLES LE BARON.

There were several actions brought against the sureties on the official bond of George S. Beers as deputy postmaster at Mobile, Alabama. The records and the questions involved in both cases are alike. They were brought to this court on writs of error and decided at December term, 1856. (19 How. 73.)

The material facts were thus briefly stated by the judge who delivered the opinion. (19 How. 75:)

"It appeared on the trial in the circuit court that Beers was appointed to that office by the President of the United States during the recess of the Senate, and received a commission bearing date in April, 1849, to continue in force until the end of the next session of the Senate, which terminated on the thirtieth day of September, 1850."

"It also appeared that in April, 1850, Beers was nominated by the President to the Senate as deputy postmaster at Mobile; and the nomination having been duly confirmed, a commission was made out and signed by President Taylor, bearing date on the twenty-second day of April, 1850, but it had not been transmitted to Beers on the first day of July, 1850, when the bond declared on bears date. Beers took charge of the post office at Mobile before his second appointment, and continued to act without intermission until he was removed from office in February, 1853. The default assigned as a breach of the bond was admitted to have occurred under his second appointment; and the principal question on this writ of error is, whether the bond declared on secures the faithful performance of the duties of the office under the first or under the second appointment."

In that case this court held that the bond spoke from the time when it reached the Postmaster General and was accepted by him, and that it covered the second appointment. The judgment of the circuit court was reversed and a *venire facias de novo* awarded. On the next trial a verdict was rendered for the plaintiff, which was set aside by the court; and on the third trial a verdict was rendered for the defendant. This was done under the instruction of the circuit court, that if the bond given in evidence was not approved until the 15th of July, 1850, then under the state of the pleadings and the issue joined in the case, the defendant was entitled to a verdict. The ruling of the circuit court on this point is the principal assignment of error. A few exceptions to the admission of evidence also appear upon the record.

ARGUMENT.

The instruction of the court to the jury (printed record, p. 33—'4) was, "that if the bond in suit was signed in Mobile on the first day of July, 1850, and Beers was then deputy postmaster under an executive appointment; and if they believed that it was not approved of by the Post Office Department until the 15th of July, 1850, then under the state of the pleadings and the issue joined in this case the defendant was entitled to a verdict." This instruction was repeated and made more emphatic by the court in compliance with a request of the defendant's counsel, (printed record, p. 33.) The substance of this instruction was, that if the bond given in evidence was approved on the 15th day of July, 1850, or on any other day after the day of its date, then the obligation was a different one from that alleged and set forth in the declaration and replication of the plaintiffs to the third plea, and they must find for the defendants.

The charge was in effect that there was a variance between the proof and the allegations of the plaintiffs.

The error in the instruction of the court to the jury consists in assuming that the allegations of time in the declaration were material, and that they must be proved as laid.

The allegation of the making of the bond in the declaration is as follows: (printed record p. 4.)

"For that whereas, heretofore, to wit, on the first day of July, in the year of our Lord eighteen hundred and fifty, at Mobile, to wit, in the State aforesaid and within the jurisdiction of this court, the said George N. Stewart, by his certain writing obligatory sealed with his seal," &c.

The assignments of the breaches are laid in these words: "That while the said Oliver S. Beers was deputy postmaster as aforesaid under said writing obligatory, and after the making and delivery thereof, to wit, on the 10th day of July aforesaid, and divers other days before the commencement of the suit," &c.

1. The bond given in evidence sustained the declaration.

The time of the making of the bond is laid under a videlicet. It was not therefore necessary to prove it as averred. (2d Saund. 290; Simpson *vs.* Talbot, 25 Alabama, 469; McDade *vs.* The State, 20 Alabama, 81.) Though a deed takes effect only from its delivery yet the delivery need not be stated in pleading. (Tompkins *vs.* Corwin, 9 Cowen, 255; citing 1 Saund. 291—note.) Plaintiff may reply or show in evidence that a deed was really made on a different day from that of its date as stated in the body of it. (Chitty Pl. vol. 1, p. 648, citing 1 Ld. Raymond, 120; see, also, 1 Chitty Pl. p. 258.)

In the plaintiff's replication to the third plea (printed record, p. 16) the time of the making and delivery of the bond are laid under a videlicet.

The issue was joined on the rejoinder of the defendant to this replication. The rejoinder (printed record, p. 17) is as follows:

"That *at the time of the execution* of said bond said Oliver S. Beers

was not postmaster in the manner and for the term of office set forth in the replication, but was postmaster by Presidential appointment as set forth in said third plea: and so he says said bond applied to and covered only the time set forth in the third plea, and did not apply to and cover any other and new tenure of office; and of this he puts himself upon the country."

The execution of the bond included its signing, sealing and delivery. (Burrill's Law Dic. tit. "Execution.") The making of the bond would seem to be the writing of it, (4 East. 481.) This rejoinder, then, tendered the substantial issue in the case, and upon that the parties went to trial. The former decision of this court, in 19 How. 73, covers the merits of the case now.

2. The evidence of the agreement of the sureties to the transfer of the former intebtedness to the new account should have been received. (Printed record, p. 32.)

The bond covered a liability for any public money collected by the postmaster "or otherwise at any time placed in his possession and custody." (See printed record, p. 11.) The agreement showed that money which had been previously received by the postmaster was left in his hands under this new arrangement. It was a new placing of it in his possession and custody. It was done with the consent of the sureties and they are estopped from contesting the validity of the transfer.